



(Billing Code 5001-06)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 237**

**RIN 0750-AI05**

**Defense Federal Acquisition Regulation Supplement: Private Sector Notification Requirements of In-Sourcing Actions (DFARS Case 2012-D036)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2012 regarding private sector notification of in-sourcing actions.

**DATES:** Effective [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ms. Janetta Brewer, telephone 571-372-6104.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published an interim rule in the Federal Register at 78 FR 65218 on October 31, 2013, to establish procedures for the

timely notification of any contractor that performs a function that the Secretary plans to convert (in-source) to performance by DoD civilian employees and provide the congressional defense committees a copy of any such notification. One respondent submitted comments in response to the interim rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided below. No changes were made to the final rule based on the public comments; however, one editorial change is being made to clarify a reference.

### **A. Analysis of Public Comments**

Comment: The respondent commented that, while the interim rule requires the contracting officer to notify an affected incumbent contractor about an in-sourcing decision within 20 business days of receiving the decision from the in-sourcing program official, the rule does not specifically address how soon DoD can commence the in-sourcing action after issuing the notice. The respondent stated the rule should require issuance of the in-sourcing notice in a reasonable amount of time prior to DoD's commencement of the in-sourcing action.

Response: No action was taken as a result of this comment. DoD guidance at DFARS 237.102-79 and in the memorandum at DFARS Procedures, Guidance and Information 237.102-79, reflects that

the in-sourcing of contracted services falls into the following three categories of justification (1) inherently Governmental functions (2) work closely associated with inherently Governmental functions, critical in nature, and unauthorized personal services, and (3) cost-based in-sourcing decisions. The nature of the contracts in these three categories is such that it is essential for the Government to have the ability to take in-sourcing actions once notification is provided to affected incumbent contractors.

Comment: The respondent suggested including specific details of the rationale for the in-sourcing decision in the notice to the contractors to ensure meaningful insight about the rationale.

Response: No action was taken on this comment as DoD included language requiring that a summary of why the service is being insourced be included in the notice and therefore, as written, the rule fulfills the objective of transparency and accountability.

#### B. Other changes

Editorial changes were made to clarify where the OASD memorandum "Private Sector Notification Requirements in Support of In Sourcing Actions," dated January 29, 2013, can be found in the DFARS Procedures Guidance and Information.

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **IV. Regulatory Flexibility Act**

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

This final rule amends DFARS 237.102-79 to implement section 938 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012 regarding private sector notification of in-sourcing actions. Section 938 of the NDAA requires the Secretary of Defense to establish procedures for the timely notification of any contractor who performs a function that the Secretary plans to convert (in-source) to performance by DoD civilian employees

and provide the congressional defense committees a copy of any such notification. The rule requires the contracting officer to notify an affected incumbent contractor about an in-sourcing decision within 20 business days of receiving the decision from the in-sourcing program official.

The public did not raise any issues in response to the initial regulatory flexibility analysis. This rule is not expected to have a significant economic impact on a substantial number of small entities. The final rule has very limited application and only potentially applies to entities that have contracts with DoD agencies performing services that fall into the following three categories for potential justification for in-sourcing: (1) inherently Governmental functions (2) work closely associated with inherently Governmental functions, critical in nature, and unauthorized personal services, and (3) cost-based in-sourcing decisions. During the acquisition planning phase, requirements are scrutinized under FAR subpart 7.5 to preclude contract awards for inherently Governmental functions and unauthorized personal service contracts. Because of this prohibition and screening of requirements, it is expected that this rule will not have a significant impact on a substantial number of contracts evaluated under category (1) for inherently Governmental functions or under category (2) for unauthorized personal services. Effective March 2013, data fields were added

to FPDS to capture award information for contract actions that are (1) critical functions, i.e. a function that is necessary to the agency being able to effectively perform and maintain control its mission and operations, and (2) functions closely associated with inherently Governmental functions. FPDS data was reviewed for a full one-year period (March 2013 through February 2014) for awards coded as critical functions or functions closely associated with inherently Governmental functions. The FPDS data reviewed reflected that only 7,786 contracts and task orders for critical functions or functions closely associated with inherently Governmental functions were awarded to small entities, compared to a total of 71,274 awards for other functions that were made to small entities during this same period. (The data reflect awards greater than the simplified action threshold of \$150,000.) It is unknown as to how many of the 7,786 awards made to small entities may be evaluated and justified for future in-sourcing action. There is no FPDS data available to evaluate the potential universe of actions that might fall under the third category of cost-based in-sourcing decisions.

There are no projected reporting, recordkeeping, and other compliance requirements associated with this rule. The rule does not duplicate, overlap, or conflict with any other Federal

rules. DoD was unable to identify any significant alternatives consistent with the stated objectives of the statute.

#### **V. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Part 237**

Government procurement.

**Amy G. Williams,**

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Accordingly, the interim rule amending 48 CFR part 237, which was published in the **Federal Register** at 78 FR 65218 on October 31, 2013, is adopted as a final rule with the following change:

#### **PART 237—SERVICE CONTRACTING**

1. The authority citation for 48 CFR part 237 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 237.102-79 by revising the last sentence in the paragraph to read as follows:

**237.102-79 Private sector notification requirements in support of in-sourcing actions.**

\* \* \* See the OASD (RFM) memorandum entitled "Private Sector Notification Requirements in Support of In-sourcing Actions," dated January 29, 2013, for further information, which is available at PGI 237.102-79.

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